Supreme Court, U.S.
FILED
07-921 JAN 9 - 2008
OFFICE OF THE CLERK

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No. ___

IN THE

Supreme Court of the United States

LUIS MARTIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

DONALD B. MARKS *
MARKS AND BROOKLIER
10100 Santa Monica Blvd., #300
Los Angeles, CA 90067
(310) 772-2287

* Counsel of Record

Attorney for Petitioner Luis Martin

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED FOR REVIEW

This case raises a significant issue regarding whether an arrangement by police to secretly record a conversation between petitioner and his girlfriend while petitioner was represented by counsel constitutes a denial of his Sixth Amendment right to counsel. See *Massiah v. United States,* 377 U.S. 201 (1964); *United States v. Henry,* 447 U.S. 264, 270-271 (1980); *Randolph v. People of the State of California,* 380 F.3d 1133, 1139 (9th Cir. 2004); *Maine v. Moulton*, 474 U.S. 159, 176, n.12 (1985).

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LUIS MARTIN,

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Luis Martin, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

On June 27, 2007, the Ninth Circuit Court of Appeals entered its unpublished decision reversing the district court's order granting petitioner's petition for a writ of habeas corpus, and thereby affirming petitioner's conviction. A copy of the District Court's Order granting Habeas Corpus is reproduced in Appendix A. The unpublished opinion is reproduced in Appendix B. On October 11, 2007, the Ninth Circuit denied Martin's timely Petition for Rehearing.

A copy of the order denying the Petition for Rehearing appears in Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

California Penal Code Section 187(a), 12022.5(a); 28 U.S.C. 2254.

STATEMENT OF THE CASE

On December 17, 1998, Mr. Martin was arrested for the murder of Jose Ramon. On December 19, 2000, a jury convicted Mr. Martin of first degree murder with the personal use of a firearm, in violation of California Penal Code Section 187(a), 12022.5(a). The court sentenced Mr. Martin to thirty-five years to life in state prison. In a published opinion issued on May 14, 2002, the California Court of Appeal affirmed Mr. Martin's conviction. *People v. Martin*, 98 Cal.App.4th 408, 119 Cal.Rptr.2d 679 (2002). A copy of the Opinion is reproduced in Appendix D. Mr. Martin filed a writ of habeas corpus in the California Supreme Court, which was denied on April 30, 2003. Thereafter, through counsel, Mr. Martin filed a writ of habeas corpus in the United States District Court, Central District of California, pursuant to the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. 2254 on May 13, 2003. The district court granted Mr. Martin's petition for a writ of habeas corpus. However, the Ninth Circuit Court of Appeals entered an unpublished decision reversing the district court's order granting petitioner's petition for a writ of habeas corpus on

June 27, 2007. Petitioner filed a petition for rehearing and a petition for rehearing en banc on July 10, 2007. On October 11, 2007, the Ninth Circuit denied the petition for rehearing and the petition for rehearing en banc.

STATEMENT OF FACTS

A. Background Information

Mr. Martin was one of the owners of Value Produce, a wholesale grocery company in downtown Los Angeles. In 1998, he employed the victim, Jose Ramon. Mr. Ramon was the boyfriend of Maricela Vargas. Ms. Vagas was a friend of Celia Camolinga (hereinafter "Ms. Camolinga), who was Mr. Martin's girlfriend.

Jose Ramon's body was found at 5:55 a.m. on November 25, 1998 on a road in Chino, California. He had been shot at close range behind his right ear. Mr. Martin was subsequently charged with Mr. Ramon's murder.

B. Facts Relevant to the *Massiah* Issue

Ms. Camolinga testified that on August 12, 1999, she visited the Ceres Police Department and told them that she was being threatened. She testified that she told the officers that Mr. Martin had confessed to her that he had killed Jose Ramon as well as Omar Casio, Ms. Camolinga's boyfriend in Mexico. She felt that this was Martin's way of telling her that she would be next.

Ms. Camolinga requested that the officers call Detective Wolf, at the San Bernardino's County Sheriff's office, who had contacted her several times the previous December regarding this case. Detective

Wolf spoke with her briefly on the phone and then drove to Ceres the next day to meet with her personally. Ms. Camolinga repeated Martin's confessions to Detective Wolf.

Detective Wolf testified that in December 1998, before Luis Martin was arrested, he had contacted Ms. Camolinga by telephone. He contacted her again several times later in December. Between December 1998 and August 1999, he called the Ceres Police Department, because he knew that she had family in that area and he was trying to locate Ms. Camolinga. He was also trying to contact her brother.

Detective Wolf explained that he and Ms. Camolinga had discussed Ms. Camolinga going into the witness protection program, but decided not to do it then. He went back to San Bernardino County and discussed the idea of tape recording Mr. Martin in a meeting with several people in the homicide detail at his headquarters. At this meeting, the officers took the position that recording Mr. Martin was legal because, instead of evoking responses from him regarding the instant case, they would be investigating him on another crime—alleged threats toward Ms. Camolinga.

Detective Wolf also discussed tape-recording Mr. Martin with Deputy District Attorney Karen Schmauss. She told him "something about not asking [about] specific crimes—specifically questions about the crime." However, Ms. Schmauss did not specifically discuss whether Ms. Camolinga should or should not discuss with Mr. Martin the instant crimes. Ms. Schmauss never affirmatively advised which specific subject areas Ms. Camolinga should avoid.

Several days later, Detective Wolf called Ms. Camolinga and asked her if she would tape-record some of her conversations with Mr. Martin. After she agreed to this arrangement, he provided her with tape recording equipment and blank cassettes. Instructions were given to Ms. Camolinga on how to operate the machinery, but no instructions were given on what she should or should not talk about.

Ms. Camolinga began recording her conversations with Mr. Martin on August 20, 1999, after the preliminary hearing in this case. She turned out to be a very skilled interrogator, who conducted a very sophisticated interrogation.

Despite defense counsel's motion to omit Mr. Martin's statements on these recordings, the trial court ruled that Mr. Martin's statements were admissible because they found that the police had no part in initiating or coordinating the contact between Ms. Camolinga and Mr. Martin; that Ms. Camolinga was not a police agent; and that Martin spoke with her willingly.

Since forensic evidence was inconclusive, the taped conversations were very prejudicial to Mr. Martin.

PROCEEDINGS BELOW

1. On December 17, 1998, Mr. Martin was arrested for the murder of Jose Ramon. On December 19, 2000, a jury convicted Mr. Martin of first degree murder with the personal use of a firearm, in violation of California Penal Code Section 187(a), 12022.5(a). The court sentenced Mr. Martin to thirty-five years to life in state prison.

2. In a published opinion issued on May 14, 2002, the California Court of Appeal affirmed Mr. Martin's

conviction. *People v. Martin*, 98 Cal.App.4th 408, 119 Cal.Rptr.2d 679 (2002).

3. Mr. Martin filed a writ of habeas corpus in the California Supreme Court, which was denied on April 30, 2003.

4. Thereafter, through counsel, Mr. Martin filed a writ of habeas corpus in the United States District Court, Central District of California, pursuant to the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. 2254 on May 13, 2003. The district court granted Mr. Martin's petition for a writ of habeas corpus.

5. The Government appealed the district court's decision to the Ninth Circuit Court of Appeals, which entered an unpublished decision reversing the district court's order granting petitioner's petition for a writ of habeas corpus on June 27, 2007. Petitioner filed a petition for rehearing and a petition for rehearing en banc on July 10, 2007. On October 11, 2007, the Ninth Circuit denied the petition for rehearing and the petition for rehearing en banc.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

I. THE COURT MUST GRANT THE PETITION TO DETERMINE WHETHER AN ARRANGEMENT BY POLICE TO SECRETLY RECORD A CONVERSATION BETWEEN PETITIONER AND HIS GIRLFRIEND WHILE PETITIONER WAS REPRESENTED BY COUNSEL CONSTITUTES A DENIAL OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL

Massiah v. United States, 377 U.S. 201 (1964) held that in order to show that a defendant's Sixth

Amendment rights were violated, a defendant must show: (1) that the informant was acting as an agent of the State when he obtained the information from the defendant; and (2) that the informant "deliberately elicited" incriminating evidence from the accused about the crime charged outside the presence of counsel.

In its June 27, 2007 opinion, the Ninth Circuit Court of Appeals found that no Sixth Amendment violation occurred. However, the Court of Appeals fails to address the thrust of Petitioner's argument. The Court specifically references the California Court of Appeal argument that "no *Massiah* violation occurred because Martin's girlfriend ("Ms. Camolinga"), questioned Martin about the pending murder charge on her own initiative without any prompting from police, and because she contacted the authorities when Martin threatened her life, not because she hoped togather information about the crime in exchange for a benefit."

However, this argument is flawed in the following respects.

A. Ms. Camolinga Was Acting As An Agent Of The State When She Obtained Information From Mr. Martin

First, Ms. Camolinga was clearly an agent of the police when she elicited incriminating statements from Mr. Martin. In *United States v. Henry*, 447 U.S. 264, 270-271 (1980), it was determined that an agency relationship was assumed where the government "must have known" that the informant would stimulate discussion with the defendant about the crime charged in exchange for leniency. Moreover, the *Henry* Court found that it is not the government's

intent that is important, but the "likely . . . result" of the government's acts. 447 U.S. 264, 271, 274 (1980). Furthermore, *Randolph v. People of the State of California*, 380 F.3d 1133, 1139 (9th Cir. 2004) stated, "there was sufficient undisputed evidence to show that the State made a conscious decision to obtain the informant's cooperation and that the informant consciously decided to provide that cooperation." The *Randolph* Court concluded that "cooperation rendered the informant an agent of the State." Specifically, "it is the relationship between the informant and the State, not the compensation the informant receives, that is the central and determinative issue."

The Ninth Circuit Court of Appeals failed to acknowledge the *Randolph* holding at all in it is reversal, and in fact, cited to the California Court of Appeal opinion, which took the contrary position, holding that a benefit is required to establish an agency relationship.

Here, Ms. Camolinga, who was frightened when Mr. Martin confessed to her that he murdered of the victim in the case at bar, Mr. Ramon, as well as by the murder of another boyfriend of Ms. Camolinga's in Mexico, contacted Detective Wolf with the San Bernardino Police Department. Ms. Camolinga specifically told police of Mr. Martin's confession to her, and that on the basis of that confession, she feared that Petitioner was going to kill her and her daughters. Ms. Camolinga felt the confession was Mr. Martin's way of telling her that she would be next. During Ms. Camolinga's conversation with Detective Wolf, they also discussed a possible solution to Ms. Camolinga's fear, namely placing her in the witness protection program. Thereafter, Detec-

tive Wolf asked Ms. Camolinga if she would record her conversations with Petitioner, which she agreed to do. Ms. Camolinga was given equipment, told how to install it, and instructed to turn it on when Petitioner called. Ms. Camolinga was not at any point instructed to avoid discussing the murder with which Petitioner had been charged, despite the fact that Petitioner was represented by counsel at that point in time.

Because Ms. Camolinga's told the police that the threats against her were made in the form of confessing the two murders, the government must have known that she would stimulate discussion with Mr. Martin about the crime charged.

Moreover, Ms. Camolinga did gather information about the crime charged in exchange for a benefit, contrary to this finding of this Court. During Ms. Camolinga's recorded conversations with Mr. Martin, she actively gathered information about the crime charged. In fact, the trial court found that Ms. Camolinga was a very active interrogator, and that she conducted a very sophisticated interrogation of Mr. Martin. During that interrogation, Ms. Camolinga delved into Mr. Martin's feelings and actions concerning the charged crime. In exchange for gathering this information, Ms. Camolinga received the very critical benefit of being placed in the witness protection program, which alleviated her fear of her own life and the lives of her children, the reason she contacted the police to begin with. However, even if Ms. Camolinga had not received this benefit, an agency relationship would have nonetheless been established because pursuant to *Randolph*, it is "not the compensation the informant receives, that is the central and determinative issue." Thus, an agency

relationship was, in fact, established between Ms. Camolinga and the police.

B. Ms. Camolinga "Deliberately Elicited" Incriminating Evidence From Mr. Martin About The Crime Charged Outside The Presence Of Counsel

In a general sense, Mr. Martin presents a *Massiah* claim. But more specifically, the issue presented is whether the police conduct complained of throughout the history of this case offends critical portions of a case which interpreted *Massiah*, *Maine v. Moulton*, 474 U.S. 159 (1985).

In *Moulton*, the Court extended the protections under *Massiah* to those situations where, as here, individuals rather than government agents are used to obtaining incriminating information from the accused outside the presence of defense counsel. *Id* at 176. *Moulton* contains, among other things, language that is extremely relevant to the case at hand. Moulton specifically explains:

> Once the right to counsel has attached and been asserted, the State must of course honor it. This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance. We have on several occasions been called upon to clarify the scope of the State's obligation in this regard, and have made clear that, at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that

> circumvents and thereby dilutes the protection afforded by the right to counsel.

Id. at 170-171 (*emphasis added*) (internal footnote omitted).

The *Moulton* Court also explained:

> The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. As noted above, this guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation. Thus, the Sixth Amendment is not violated whenever--by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached. [ ] ***However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity.*** Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent.

Id. at 176 (internal citation omitted).

The conduct of the police in the instant case violates the spirit and letter of *Moulton* on every level

because the police seized an opportunity to have Ms. Camolinga "deliberately elicit" incriminating evidence from Mr. Martin about the crime charged outside the presence of counsel.

Here, after the police were contacted by Ms. Camolinga, they provided her with equipment, told her how to install it, and instructed her to turn it on when Petitioner called. The police failed to instruct Ms. Camolinga at any point to avoid discussing the murder with which Petitioner had been charged, despite the fact that Petitioner was represented by counsel at that point in time.

This failure is especially relevant in light of the fact that the officers knew that the threats of which Ms. Camolinga complained were, in part, comprised of Petitioner's confession to murdering the victim in the case at bar.

If the officers truly believed that it was possible to elicit information about potential threats against Ms. Camolinga without also eliciting information about the crime charged, they surely would have instructed Ms. Camolinga to avoid the topic of the murder. However, because the alleged threats were specifically intertwined with the murder, the police knew this was impossible, but nevertheless allowed Ms. Camolinga to effectively interrogate Petitioner without limitation. Not surprisingly, when Ms. Camolinga began recording her telephone conversations with Petitioner on August 20, 1999, she did not limit her questioning to the threats made against her, but also questioned Petitioner extensively about the crime charged.

Thus, it is clear, pursuant to *Moulton*, that the police knew Ms. Camolinga was likely to obtain

incriminating statements from the accused during these recorded conversations. Based on the case law discussed hereinabove, as applied to the facts of the case at bar, it is clear that material issues were overlooked in the Ninth Circuit's reversal of the district court's order granting Mr. Martin's writ of habeas corpus.

CONCLUSION

Mr. Martin respectfully requests that this Court grant the Petition.

Respectfully submitted,

DONALD B. MARKS *
MARKS AND BROOKLIER
10100 Santa Monica Blvd., #300
Los Angeles, CA 90067
(310) 772-2287

* Counsel of Record

Attorney for Petitioner
Luis Martin

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

[Filed MAR. 29, 2005]

NO. ED CV 03-00541 CBM (RZ)

LUIS MARTIN

Petitioner,

v.

GEORGE GIURBINO

Respondent.

ORDER GRANTING PETTION FOR WRIT OF HABEAS CORPUS

Pursuant to 28 U.S.C. §636, the Court has reviewed the Petition, all the records and files herein, and the Report and Recommendation of the United States Magistrate Judge. The Court has reviewed *de novo* those portions of the report or specified proposed findings or recommendations to which Petitioner objected. The Court rejects the recommendations of the magistrate judge and GRANTS the Petition for Writ of Habeas Corpus. Fed. R. Civ. P. 72(b); *Hunt v. Pliler*, 384 F.3d 1118, 1123 (9th Cir. 2004).

Factual and Procedural Background

On December 17, 1998, Petitioner was arrested for the murder of Jose Ramon. On December 19, 2000, Petitioner was convicted of first degree murder with the personal use of a firearm and sentenced to thirty-five years to life in state prison. The California Court

of Appeal affirmed the conviction in a published opinion issued May 14, 2002. *People v. Martin*, 98 Cal.App.4th 408, 119 Cal.Rptr.2d 679 (2002). The sole issue on appeal was whether Petitioner's Sixth Amendment right to counsel was violated when the police arranged for his girlfriend to secretly record inculpatory telephone conversations while he was represented by counsel. Petitioner filed a petition for writ of habeas corpus in the California Supreme Court, which was denied on April 30, 2003. On May 13, 2003, Petitioner filed a Writ of Habeas Corpus in this Court, raising the same Sixth Amendment issue that was raised in his direct appeal.

The following facts regarding Petitioner's case are set forth in the California Court of Appeal's May 14, 2002 opinion. Petitioner was represented by counsel at a preliminary hearing held in early February 1999. Petitioner's girlfriend, Ms. Camolinga, did not testify at the preliminary hearing. After the murder of Mr. Ramon, Ms. Camolinga began dating a man named Omar Cosio in Mexico and became pregnant. Petitioner learned of the pregnancy and threatened and coerced Ms. Camolinga to move to the town of Ceres in the San Jose area. She moved there in June 1999 and obtained an abortion because she believed this would prevent Petitioner from harming Mr. Cosio. Nevertheless, Mr. Cosio was murdered on June 22, 1999. Ms. Comalinga was frightened by the murders of Mr. Ramon and Mr. Cosio and thought Petitioner was going to kill her and her daughters next. She went to the Ceres Police Department on August 12, 1999. The Ceres officer contacted Detective Wolf with the San Bernardino police department, who discussed the witness protection program with Ms. Camolinga.

When Detective Wolf returned to San Bernardino, he discussed the possibility of recording Petitioner's conversations with this colleagues. He stated that he was investigating the crime of intimidating a witness. A decision was made to provide tape-recording equipment to Ms. Camolinga. Detective Wolf asked her if she would record her conversations with Petitioner, and she agreed to do so. The Ceres officers gave her the equipment, told her how to install it, and instructed her to turn it on when Petitioner called. Detective Wolf did not tell Ms. Camolinga to avoid discussion of the details of the murder of Mr. Ramon. Ms. Camolinga began recording telephone conversations with Petitioner on August 20, 1999. The trial court found that she was a very active interrogator who conducted a very sophisticated interrogation on her own. Her questioning was not limited to the threats made against her, but delved deep into defendant's feelings and actions concerning the charged crime, the murder of Mr. Ramon. Since forensic evidence was inconclusive, the taped conversations were very prejudicial to Petitioner. Ms. Camolinga and her daughters subsequently entered the witness protection program.

DISCUSSION

A. Standard of Law

Under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), 42 U.S.C. §2254, an application for writ of habeas corpus pursuant to the judgment of I a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as deter-

mined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Circuit law may be "persuasive authority for purposes of determining whether a particular state court decision is an 'unreasonable application' of Supreme Court law." *Davis v. Woodford*, 333 F.3d 982, 990-91 (9th Cir. 2003). However, only the Supreme Court's holdings need be reasonably applied by the state courts under the AEDPA. *Lockyer v. Andrade*, 538 U.S. 63, 123 S.Ct. 1166, 1172 (2003).

B. Analysis

To show that a defendant's Sixth Amendment rights were violated, a defendant must show: (1) that the informant was acting as an agent of the State 3 when he obtained the information from the defendant; and (2) that the informant "deliberately elicited" incriminating evidence about the crime charged. *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L. Ed. 2d 246 (1964).

1. Agency

In addressing whether Ms. Camolinga acted as the agent of the State, the California Court of Appeal relied on the test for agency set forth in *People v. Frye*, 18 Cal.4th 894, 77 Cal.Rptr.2d 25 (1998), which requires the defendant to show that the informant acted "at the behest of the police in accordance with a *preexisting agreement and with the expectation of receiving a benefit or advantage*."[1] (Emphasis added).

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[1] In *People v. Frye*, the California Supreme Court found no evidence that the defendant's alleged accomplice was acting as a government agent merely because the police arranged for her to meet with the defendant.

While this test is consistent with the test for agency employed by several Circuits, the Ninth Circuit recently held that a jail-house informant may be considered a government agent without an explicit agreement regarding compensation. *Randolph v. People of the State of California*, 380 F.3d 1133, 1144 (9th Cir. 2004). In reaching this conclusion, the Ninth Circuit relied on *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L. Ed. 2d 115 (1980), where the Court found that it is not the government's intent that is important, but the "likely . . . result" of the government's acts. 447 U.S. at 271, 274. *See also Maine v. Moulton*, 474 U.S. 159, 176 (1985) (finding that "proof that the State 'must have known' that its agent was likely to obtain incriminating statements from the accused in the absence of counsel suffices to establish a Sixth Amendment violation"); *United States v. Harris*, 738 F.2d 1068, 1071 (9th Cir. 1984) ("Henry establishes that the determinative issue is not the informant's subjective intentions, but rather whether the federal law enforcement officials created a situation which would likely cause the defendant to make incriminating statements."). In *Randolph*, "there [was] sufficient undisputed evidence to show that the State made a conscious decision to obtain [the informant's] cooperation and that [the informant] consciously decided to provide that cooperation." The Ninth Circuit concluded that "that cooperation rendered [the informant] an agent of the State." *Id.* In other words, "*it is the relationship between the informant and the State, not the compensation the informant receives, that is the central and determinative issue.*" *Id.* (Emphasis added). The California Court of Appeal did not address the cooperation between Ms. Camolinga and the officers in analyzing the agency issue.

Furthermore, in determining that Ms. Camolinga was not a State agent, the California Court of Appeal found that "there is simply *no evidence* that the government sought to obtain incriminating evidence against the defendant by knowingly circumventing his right to counsel." 98 Cal.App.4th at 420 (emphasis added). This factual finding is unreasonable given that the police furnished Ms. Camolinga with the recording equipment and instructed her to record all of Petitioner's calls knowing that the "threats" of which Ms. Camolinga complained were, in part, comprised of Petitioner's confession to murdering Ramon. Moreover, Ms. Camolinga's aggressive interrogation techniques indicated that she perceived an agreement with police to furnish information. The California Court of Appeal even noted that the testimony presented created a "permissible inference" that an agreement existed between the police and Ms. Camolinga to gather information regarding the murder of Jose Ramon. *Id.* at 421. Thus, in finding that there was "no evidence" that government officials knowingly circumvented Petitioner's right to counsel, it appears that the California Court of Appeal considered only direct proof of the government's knowledge. In *Moulton*, the Supreme Court recognized that [d]irect proof of the State's knowledge will seldom be available to the accused" and therefore specified that "proof that the State '*must have known*' that its agent was likely to obtain incriminating statements from the accused in the absence of counsel suffices to establish a Sixth Amendment violation." 474 U.S. at 176, n.12 (emphasis added). The facts of this case clearly indicate that the officers must have known that Ms. Camolina *was likely to obtain* incriminating statements from Petitioner by tape recording their conversations. Therefore, the Court

finds that the California Court of Appeal's determination was contrary to Federal law, as determined by the Supreme Court in *Henry* and *Moulton*.

2. Deliberate Elicitation

In determining whether the officers "deliberately elicited" incriminating statements from Petitioner, the California Court of Appeal distinguished the present case from *Henry*, where the Supreme Court considered the following factors: (1) the informant was acting under government instructions and paid for his information; (2) the informant was ostensibly only a fellow inmate; and (3) the conversations occurred while *Henry* was in custody. With regard to the first factor, the Ninth Circuit found in *Randolph* that payment was not necessary pursuant to *Henry*. The second factor, which was not discussed by the California Court of Appeal, supports Petitioner's position, as the court found that Petitioner "clearly trusted [Ms. Camolinga] and confided in her" and that "she used her relationship with defendant to elicit inculpatory admissions." 98 Cal.App.4th at 418. Cf. *Henry*, 447 U.S. at 270 (noting that the record showed that the informant "deliberately used his position [as a fellow inmate] to secure incriminating information when counsel was not present). Finally, the fact that Petitioner was out of jail on bail at the time the tape recordings occurred is not determinative, as neither the defendant in *Massiah* nor *Moulton* was in custody at the time that the Sixth Amendment violation occurred.[2]

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[2] It should also be noted that in *Moulton*, the Supreme Court found that the prohibition on using undisclosed agents to "deliberately elicit" information extends to the situation where the accused initiates contact with the agent.

Besides discussing the factors in *Henry*, the California Court of Appeal offers little support for its conclusion that the officers did not deliberately elicit incriminating remarks. The court stated, "we are not convinced that the mere furnishing of recording equipment, without more, is a violation of *Henry*. . . . The police did nothing more than facilitate the recording of the conversation . . . . such facilitation is not enough to show a knowing circumvention of defendant's Sixth Amendment right to counsel." 98 Cal.App.4th at 422. In *Moulton*, however the U.S. Supreme Court found that "it is clear that the State violated Moulton's Sixth Amendment right when it arranged to record conversations between Moulton and its undercover informant, Colson." 474 U.S. at 176. Here, too, the officers deliberately elicited incriminating statements by asking Ms. Camolinga to tape record her conversations with Petitioner. Therefore, the Court finds that the California Court of Appeal's decision involved an unreasonable application of Supreme Court law.

CONCLUSION

Based on the foregoing, the Court GRANTS the Petition for Writ of Habeas Corpus.

DATE: March 25, 2005

/s/ Consuelo B. Marshall
CONSUELO B. MARSHALL
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed JUN. 27, 2007]

No. 05-55611
D.C. No. CV-03-00541-CBM (RZ)

LUIS MARTIN,
Petitioner-Appellee,

v.

GEORGE GIURBINO,
Respondent-Appellant.

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, District Judge, Presiding

Argued and Submitted June 5, 2007
Pasadena, California

MEMORANDUM

Before: SILVERMAN and CALLAHAN, *Circuit Judges*, and ROBART, *District Judge*.

This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

The Honorable James L. Robart, United States District Judge for the Western District of Washington, sitting by designation.

Warden George Giurbino appeals the district court's order granting Luis Martin's petition for a writ of habeas corpus. We reverse.

In his habeas corpus petition, Martin contends that the government violated his Sixth Amendment right to counsel when it introduced as evidence inculpatory statements he made to his girlfriend, who had secretly arranged, with police to record the couple's telephone conversations while Martin was out on bail. *See Massiah v. United States*, 377 U.S. 201, 206 (1964) (holding that the government violates the Sixth Amendment when it introduces incriminating statements that police have deliberately elicited from the accused outside the presence of counsel).

We conduct *de novo* review of the district court's decision to grant Martin's petition for a writ of habeas corpus. *Ramirez v. Castro*, 365 F.3d 755, 762 (9th Cir. 2004). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), this court cannot grant habeas relief unless the state court's adjudication of Martin's claim resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence. 28 U.S.C. § 2254(d).

Here, the California Court of Appeal held that no *Massiah* violation occurred because Martin's girlfriend questioned Martin about the pending murder charge on her own initiative without any prompting from police, and because she contacted the authorities when Martin threatened her life, not because she hoped to gather information about the crime in exchange for a benefit. The Court of Appeal considered and rejected Martin's argument under *United*

States v. Henry, 447 U.S. 264 (1980), that the only permissible inference from the evidence was that the police knowingly exploited an opportunity to question Martin without his counsel present.

Under the constraints of AEDPA, we conclude that the California Court of Appeal's denial of Martin's claim does not involve an objectively unreasonable application of federal law. The government runs afoul of the Sixth Amendment when it designates an informant to question the accused on its behalf, outside the presence of counsel. *Massiah*, 377 U.S. at 206. Still, in order for such a violation to occur, the police and their informant must take "some action . . . designed deliberately to elicit incriminating remarks." *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986); *see also Moulton v. Maine*, 474 U.S. 159, 176 (1985) (noting "the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements"); *Brooks v. Kincheloe*, 848 F.2d 940, 945 (9th Cir. 1988) (holding that no Sixth Amendment violation occurred where an enterprising informant took it upon himself to question the accused). Thus, the California Court of Appeal's denial of Martin's claim based on a finding that Martin's girlfriend acted on her own and not as an agent of the government does not amount to an unreasonable application of federal law to the evidence presented. *Cf. Henry*, 447 U.S. at 270-71 (assuming an agency relationship where prosecutors paid seasoned jailhouse plant on a contingency-fee basis, such that the government "must have known" that the informant would stimulate discussion with the defendant about the crime charged in exchange for leniency).

REVERSED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Office of the Clerk
95 Seventh Street; San Francisco, California 94103

General Information
Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the file stamp date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1, 2)

- The mandate will issue seven (7) calendar days after the expiration of the time for filing a petition for rehearing or seven (7) calendar days from the denial of a petition for rehearing, unless the court directs otherwise. If a stay of mandate is sought, an original and four (4) copies of the motion must be filed. The mandate is sent only to the district court or agency, we do not provide a copy to the parties.

Publication of Unpublished Disposition (9th Cir. R. 40-2)

- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency, or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1) Petition for. Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to 4)

(1) A. Purpose (Panel Rehearing):

- A petition for panel rehearing should only be made to direct the Court's attention to one or more of the following situations:
  - A material point of fact or law overlooked in the decision;
  - A change in the law which occurred after the case was submitted and which appears to have been overlooked by the panel;
  - An apparent conflict with another decision of the court which was not addressed in the opinion.
- Petitions which merely reargue the case should not be filed.

B. Purpose (Rehearin En Banc)

- Parties should seek en banc rehearing only if one or more of the following grounds exist:
  - Consideration by the full court is necessary to secure or maintain uniformity of decisions; or
  - The proceeding involves a question of exceptional importance; or
  - The opinion directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition may be filed within fourteen (14) days from entry of judgment. Fed. R. App. P. 40 (1)
- If the United States or an agency or officer thereof is a party in a civil appeal, the time for filing a petition for rehearing is 45 days from entry of judgment. Fed. R. App. P. 40 (1)
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- *See* 9th Cir. R. 40-2 (motion to publish unpublished disposition)

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies

- The format is governed by 9th Cir. R. 40-1 and Fed. R. App. P. 32(c)(2).
- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.

- If an unrepresented litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.
- The petition or answer must be accompanied by a certificate of compliance found at Form 11.
- If a petition for panel rehearing does not include a petition for rehearing en banc, the movant shall file an original and 3 copies.
- If the petition for panel rehearing includes a petition for rehearing en banc, the movant shall file an original and 50 copies.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The bill of costs must be filed within 14 days after entry of judgment.
- See attached form for additional information.

Attorney's Fees

- Circuit Rule 39-1 describes the content and due dates for attorney fee applications.
- Any relevant fauns are available on our website www.ca9.uscourts.gov or by telephoning 415 355-7806.

Petition for Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourtus.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.

- If there are any errors in a published opinion, please notify in writing within 10 days:
  - West Publishing Company; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Kathy Blesener, Senior Editor), and
  - Clerk, U.S. Court of Appeals; PO Box 193939; San Francisco, CA 94119-3939 (Attn: Opinions Clerk).

Form 10. Bill of Costs

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ CA No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, Circuit Rule 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk			
	No. of Docs.*	Pages per Doc.	Cost per Page **	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page	TOTAL COST
Excerpt of Record								
Appellant's Brief								
Appellee's Brief								
Appellant's Reply Brief								
			TOTAL	$			TOTAL	$

Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys fees cannot be requested on this form.

* If more than 7 excerpts or 20 briefs are requested, a statement explaining the excess number must be submitted.

** Costs per page may not exceed .10 or actual cost, whichever is less. Circuit Rule 39-1.

I, _____, swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature: _____
Date: _____

Name of Counsel (printed or typed): _____
Attorney for: _____

Date: _____ Costs are taxed in the amount of $____

Clerk of Court
By: _____Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-55611
D.C. No. CV-03-00541
CBM(RZ)

LUIS MARTIN,
Petitioner-Appellee,

v.

G.J. GIURBINO, Warden,
Respondent-Appellant.

JUDGMENT

Appeal from the United States District Court for the Central District of California, Riverside.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Riverside and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED.

Filed and entered 06/27/07

APPENDIX C

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed OCT 11, 2007]

No. 05-55611
D.C. No. CV-03-00541-CBM(RZ)
Central District of California, Riverside

LUIS MARTIN,
Petitioner-Appellee,
v.
G.J. GIURBINO, Warden,
Respondent-Appellant.

ORDER

Before: SILVERMAN and CALLAHAN, *Circuit Judges*, and ROBART, *District Judge*.

The panel has voted to deny appellee's petition for rehearing and Judges Silverman and Callahan have voted to reject the petition for rehearing en bane and Judge Robart so recommends.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

The Honorable James L. Robart, United States District Judge for the Western District of Washington, sitting by designation.

APPENDIX D

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

[Filed MAY 17, 2002]

E028833
(Super. Ct. No. FCH03073)

THE PEOPLE,
Plaintiff and Respondent,

v.

LUIS MARTIN,
Defendant and Appellant.

OPINION

APPEAL from the Superior Court of San Bernardino County. Shahla Sabet, Judge. Affirmed.

Donald B. Marks for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Robert M. Foster Supervising Deputy Attorney General, Steven T. Oetting and Lora Fox Martin, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Martin of one count of first degree murder (Pen. Code, § 187, subd. (a)[1]) and

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[1] Unless otherwise indicated, all further statutory references

found that he personally used a firearm in committing the crime (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a)). Having been sentenced to a term of 35 years to life in prison, he appeals.

The sole issue on appeal is defendant's contention that his constitutional rights were violated when the police arranged for his girlfriend to secretly record inculpatory telephone conversations while he was represented by counsel, in violation of his constitutional right to counsel, as stated in *Massiah v. United States* (1964) 377 U.S. 201, and its progeny.

FACTS

Defendant Martin is one of the owners of Value Produce, a wholesale grocery company in downtown Los Angeles. In 1998, he offered a job to the victim, Jose Ramon. Mr. Ramon was the boyfriend of Maricela Vargas. Ms. Vargas was a friend of Celia Camolinga, defendant's girlfriend.

Mr. Ramon was last seen at work at Value Produce between 3:00 a.m. and 3:15 a.m. on November 25, 1998.[2] His body was found at five minutes before 6 a.m. on the same morning on a foggy road in Chino. He had been shot at close range behind his right ear.

Defendant was also at work that morning, and he was last seen at about the same time as the victim. The prosecution relied on his cell phone records to establish his location during the crucial time period. Those records showed he made a call which was

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are to the Penal Code.

[2] Defendant's brother was sure he had seen defendant and the victim at work at that time. He also testified he had seen them later, and estimated the time at between 4:00 a.m. and 4:20 a.m. However, he was not sure of the latter time.

handled by a cell tower in Monterey Park at 3:34 a.m. The tower is located next to the 60 freeway in Paramount. The next call was made in Chino at 4:22 a.m. The Chino cell tower is located about four miles from where the body way found. Subsequent calls were handled progressively by cell towers to the west of Chino, ending with a call near his girlfriend's apartment in Calabasas at 5:15 a.m. The girlfriend, Ms. Camolinga, testified that defendant arrived at her apartment after 5:00 a.m. and left at 7:00 a.m.

After the preliminary hearing, Ms. Camolinga taped several hours of telephone conversations with defendant, as described below. Transcripts of the tapes, which were incriminating, were read to the jury. Since forensic evidence was inconclusive, the taped conversations were very prejudicial to defendant.

In addition, Ms. Camolinga testified that defendant confessed the crime to her in person, and she supplied a motive for the crime. She testified that defendant told her that he was very angry with Mr. Ramon because Mr. Ramon had told defendant's wife about his relationship with Ms. Catnolinga.[3]

Ms. Camolinga also testified that defendant was very controlling and jealous of her, particularly when he discovered that she was dating another man in her home town of Manzanillo, Mexico. Maricela Vargas gave another possible motive for the killing when she testified that defendant was angry with Mr. Ramon for not telling him about Ms. Camolinga's other relationship.

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[3] Ms. Camolinga also testified that the reason was absurd because defendant had previously told her that his wife knew he had a girlfriend.

In closing argument, the prosecutor relied on a third possible motive based on defendant's taped statements. That possible motive was that defendant was angry that Mr. Ramon had discussed defendant's relationship with Ms. Camolinga with people at work, and had thereby threatened the relationship.

The defense was that defendant had not committed the crime. Specifically, the defense produced forensic evidence that the victim was killed immediately before the body was discovered at 5:55 a.m. At that time, defendant was in Calabasas. However, the defense never explained what the defendant was doing in China at 4:22 a.m. and the jury apparently believed the prosecution's theory that the victim was killed before that time.

THE MASSIAH MOTION

Prior to trial, defendant filed a motion to exclude from evidence transcripts of his taped telephone conversations with Celia Camolinga. The motion asserted that the conversations were obtained in violation of his right to counsel under *Massiah v. United States, supra*, 377 U.S. 201.

In *Massiah*, the Supreme Court said: "We hold that the petitioner was denied the basic protections of [the Sixth Amendment] guarantee when there was used against him at trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." (*Massiah v. United States, supra*, 377 U.S. 201, 206.)

Accordingly, our Supreme Court has said: "In determining the merits of a *Massiah* claim, the essential inquiry is whether the government intentionally created a situation likely to induce the accused to

make incriminating statements without the assistance of counsel. [Citations.] . . . To prevail on such a claim, the defendant must show (1) that the informant acted as a government agent at the behest of the police in accordance with a preexisting agreement and with the expectation of receiving a benefit or advantage, and (2) that the informant deliberately elicited incriminating statements." (*People v. Frye* (1998) 18 Cal.4th 894, 993.)

"Whether to allow an informant's testimony is 'an essentially factual question, and we review it on a deferential standard.' [Citation.]" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1247-1248.)

We review the evidence presented at the hearing on the motion with these principles in mind.

FACTS RELATING TO THE MASSIAH MOTION[4]

A hearing was held on defendant's *Massiah* motion, and extensive testimony was heard. The trial court read and considered the transcripts of the recorded conversations as "circumstantial evidence or indirect evidence of the fact of whether or not there was actually some coercion, intimidation, solicitation, whatever you want to call it, that reflects on my ultimate decision . . . ."

Mr. Ramon was murdered on November 25, 1998. Defendant was arrested for the crime on December 17, 1998. A preliminary hearing was held in early February 1999. Defendant was represented by his

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[4] The facts in this section are primarily taken from the hearing on the Massiah motion. However, after receiving our decision denying his petition for writ of mandate (E028082), defendant renewed his motion at trial. Facts elicited at trial may therefore be relevant to our decision on this issue.

present counsel at the preliminary hearing, and at all subsequent times.[5] Subsequently, he was released on a million dollar bail bond.

Ms. Camolinga testified that defendant had her followed at her home in Manzanillo, Mexico. When she came to California, he showed her a photo album of her daily activities in Mexico. He would also call her and tell her what she and her daughters were wearing that day.

After Mr. Ramon was killed, Ms. Camolinga began dating a man named Omar Cosio. She became pregnant. Defendant learned of the pregnancy and threatened and coerced her to move to the town of Ceres in the San Jose area.[6] She moved there with her daughters on June 1, 1999. Defendant paid for the tickets and bought a home for her that was about a block from her brother's home. Defendant furnished the home and paid all the household expenses. He called her constantly during the day and would visit her every weekend.

Ms. Camolinga testified she moved to Ceres and remained there because of defendant's threats against her and her daughters. As soon as she arrived in Ceres, she obtained an abortion. She testified she did not want to have an abortion, but did so because defendant threatened her daughters and Mr. Cosio: "I believed [defendant] was going to do [Mr. Cosio]

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[5] Ms. Camolinga did not testify at the preliminary hearing. She later testified that she had refused to leave Mexico because defendant had threatened her, and two men had accosted her with a gun in Mexico and threatened her further.

[6] Ms. Camolinga testified that she talked to a Mexican judge about defendant's threats and was told she needed proof that defendant had threatened her.

harm. I believed that it was in my hands to save them [by having the abortion]." Nevertheless, Mr. Cosio was murdered on June 22, 1999.

Ms. Camolinga testified she was very frightened because Mr. Ramon and Mr. Cosio had been murdered and she thought defendant was going to kill her or her daughters next. Accordingly, she went to the Ceres Police Department on August 12, 1999. The Ceres officer called Detective Wolf; the investigating officer at the San Bernardino Police Department. Detective Wolf and another officer immediately drove to Ceres and talked to Ms. Camolinga the next day. Detective Wolf discussed the witness protection program with her, but did not say anything about recording conversations.

When Detective Wolf returned to San Bernardino, he discussed the possibility of recording defendant's conversations with his colleagues and a deputy district attorney. He stated that he was investigating the crime of intimidating a witness. A decision was made to provide tape recording equipment to Ms. Camolinga. Detective Wolf asked her if she would record the conversations, and she agreed to do so. The Ceres officers gave her the equipment, told her how to install it, and instructed her to turn it on when defendant called. Detective Wolf denied that any other instructions or list of questions was given to her, but stated that his concern was to document the threats made to her at the time. He agreed, however, that he did not tell her to avoid discussion of the details of the murder of Mr. Ramon.

Ms. Camolinga began recording telephone conversations with the defendant on August 20, 1999. She turned out to be a very good questioner. As the trial court ultimately found, she was a very active inter-

rogator who conducted a very sophisticated interrogation on her own. Her questioning was not limited to threats against her, but delved deep into the defendant's feelings and actions concerning the charged crime, the murder of Mr. Ramon.

As a result of the tapes, defendant's bail was revoked and he was remanded to custody on September 2, 1999. In its motion, the prosecution asked that bail be denied because Ms. Camolinga had been threatened and because defendant had left the country without permission while on bail, i.e., he was suspected of killing Mr. Casio in Mexico City while on bail.

THE TRIAL COURT'S DECISION

The trial court's decision rests primarily on the case of *People v. Wojtkowski* (1985) 167 Cal.App.3d 1077. In that case, defendant was arrested for spousal battery and related charges. Defendant called his wife several times and his wife recorded the conversations. A detective had installed a recorder on her telephone and she was advised to record any conversation with defendant. The police told her that the purpose of the recording was to locate defendant, to allow them to protect her if defendant threatened her, and to record defendant's admissions, if any. (*Id.* at p. 1079.)

Defendant asserted that the recordings violated his *Miranda*[7] and *Massiah* rights. The appellate court disagreed, noting that the relationship between defendant and his wife was adversarial because he knew she would be the main witness against him. It said: "No breach of trust by a false friend is involved

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[7] *Miranda v. Arizona* (1966) 384 U.S. 436.

when an accused initiates a conversation to intimidate the prosecuting witness against him from testifying." (*People v. Wojtkowski, supra*, 167 Cal.App.3d 1077, 1082.) The court also found that the police "did not intentionally create a situation where defendant was likely to make incriminating statements." (*Ibid.*) Finally, the court found that defendant had no reasonable expectation of privacy in talking to the prosecution witness because defendant does not have "a constitutionally protected expectation that the victim he is trying to intimidate will not betray him by recording the conversation." (*Id.* at p. 1083.) Accordingly, the court found no *Miranda* or *Massiah* violation.

In analyzing the issue, the trial court here focused on the conduct of the parties and found (1) Ms. Camolinga voluntarily contacted the police; (2) she was in fear for her life, and that of her daughters, and asked for help from the police; (3) the police only provided the recording equipments[8]; (4) the police did not give her any instructions or suggested questions; (5) the interrogation made by Ms. Camolinga was her own idea; and (6) defendant voluntarily called and talked to her, thus waiving his right to counsel.

Accordingly, the trial court concluded that "the witness in this case did not act as an agent of the government in attempting to elicit statements regardless of whether the statements were elicited for purposes of gathering information against the charges pending or for future threats." The court noted that the only thing the officers did was to provide the recording equipment. Obviously, there would have

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[8] The police also assisted her by subsequently placing her in a witness protection program.

been no agency issue if Ms. Camolinga had provided her own equipment and made the same recordings. Based on these factors, and *Wojtkowski*, the trial court denied the motion to suppress the recorded statements.

DISCUSSION

Defendant argues (1) the trial court erred in its waiver determination because Ms. Camolinga presented herself as a "false friend" and there was no evidence that defendant did not trust her; (2) the trial court erred in determining that Ms. Camolinga was not an agent of the police; (3) the evidence shows an agreement between the police and Ms. Camolinga to elicit inculpatory statements; (4) the police created a situation likely to induce defendant to make incriminating statements; and (5) the statements are inadmissible even if there was a legitimate reason for recording defendant's conversations.

1. The Waiver Determination. As noted above, the trial court found that defendant "apparently knowingly and intelligently waived [his Sixth Amendment] right and chose to talk to this individual who he repeatedly said that I don't trust and the phone can be tapped."

Defendant disagrees, finding that, because of their long romantic relationship, Ms. Camolinga presented herself as a "false friend" and used that status to extract admissions from defendant. In other words, "Ms. Camolinga's basic approach was to indicate to [defendant] that in order for their relationship to continue she must be able to trust him, and therefore, must know everything concerning the murder of Jose Ramon."

The "false friend" terminology was used at least as far back as 1951, when Justice Jackson said: "The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility." (*On Lee v. United States* (1952) 343 U.S. 747, 757.) Later, in a classic false friend case, Chief Justice Warren said: "Petitioner was apparently unaware of John Gay's famous couplet: [¶] 'An open foe may prove a curse, But a pretended friend is worse,' [¶] and he yielded to his false friend's entreaties." (*Spano v. New York* (1959) 360 U.S. 315, 323.) *Spano* was the basis for *Massiah*. (*Massiah v. United States, supra*, 377 US. 201, 204-205.)

We think it is relatively clear here that Ms. Camolinga was indeed a false friend in the sense that she used her relationship with defendant to elicit inculpatory admissions. Contrary to the trial court's decision, we find that defendant clearly trusted her and confided in her. But that does not end the matter. As discussed below, we must also determine whether Ms. Camolinga was used as a false friend by the police and whether, as *Wojtkowski* holds, there is no breach of trust by a false friend "when an accused initiates a conversation to intimidate the prosecuting witness against him from testifying." (*People v. Wojtkowski, supra*, 167 Cal.App.3d 1077, 1082.)

Respondent urges that Ms. Camolinga was not a false friend because their relationship became adversarial, and it became adversarial because defendant knew that Ms. Camolinga was the prime witness against him. But defendant had already been successful in keeping Ms. Camolinga from testifying at the preliminary hearing, and his success might have led him to believe he could trust her and that she

would not testify against him at trial. However, he did indicate an awareness that their telephone conversations might be taped, and this factor tends to establish that the statements were made voluntarily in spite of the risk. It also indicates that defendant had no real expectation of privacy in their conversations. (*People v. Wojtkowski, supra*, 167 Cal.App.3d 1077, 1083.)

We agree with defendant and the trial court that Ms. Camolinga engaged in a sophisticated interrogation of defendant. Defendant uses this fact to distinguish the case from *Wojtkowski* because, in that case, the wife did not engage in such questioning, and did not make comments to elicit statements from defendant. (*People v. Wojtkowski, supra*, 167 Cal.App. 3d 1077, 1082.) Although this is a distinguishing factor, defendant has not established that the questioning was deliberately elicited by Ms. Camolinga acting as an agent of the government. "If an informant 'acts on his own initiative,' even if he interrogates the accused, 'the government may not be said to have deliberately elicited the statements.' [Citations.]" (*People v. Fairbank, supra*, 16 Cal.4th 1223, 1247.) In other words, "[t]he police simply made use of [the informant's] own motivation to inform on defendant, a technique we found not to be a knowing subversion of the defendant's right to counsel . . . ." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1250.)

We therefore disagree with the trial court on the waiver issue: "Moreover, the concept of a knowing and voluntary waiver of Sixth Amendment rights does not apply in the context of communications with an undisclosed undercover informant acting for the Government. [Citation.]" (*United States v. Henry* (1980) 447 U.S. 264, 273.) Thus, defendant did not

waive his Sixth Amendment rights by talking with Ms. Camolinga if she was acting for the government. We therefore turn to that issue.

2. The Agency Determination. Defendant argues the trial court erred in finding that Ms. Camolinga was not an agent of the police. He emphasizes Ms. Camolinga's testimony in which she stated that she went to the Ceres Police Department in order to document defendant's threats against her. Although defendant claims that no direct threats were recorded, Ms. Camolinga testified that she was recording the conversations to document her fear of defendant and the threats he had been making. She stated: "[A]fter hearing what he told me about the death of Jose and Omar, I was afraid for my daughters and for me, for my life, because he showed me he had no heart or fear of anything." In other words, she considered the murders threatening to her.

Defendant therefore contends that Ms. Camolinga was acting as the agent for the police because the police knew that the threats against her consisted of the murders themselves. Thus, any inquiry into the threats would necessarily be an impermissible inquiry into the facts of the underlying crime.

As defendant acknowledges, Detective Wolf testified that he thought that *Massiah* was inapplicable because defendant was being investigated for the crime of intimidating a witness. He also testified that the only instruction given to Ms. Camolinga was to turn on the tape recorder when defendant called,

Defendant cites *Maine v. Moulton* (1985) 474 U.S. 159. In that case, the Supreme Court reaffirmed that "the Sixth Amendment is violated when the State obtains incriminating statements by knowingly cir-

cumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." (*Id.* at p. 176, fn. omitted.) The court rejected the argument that defendant's Sixth Amendment rights were not violated because the defendant initiated a meeting with his codefendant which was taped by the police with the codefendant's help. It found the state has an "affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right." (*Id.* at p. 176.)

The issue is whether there was an agreement to knowingly circumvent defendant's Sixth Amendment rights in the present case. Defendant cites *People v. Frye, supra*, 18 Cal.4th 894. But in *Frye*, our Supreme Court found no such violation. It noted that there was no evidence that defendant's alleged accomplice was acting as a government agent merely because the police arranged for her to meet with the defendant. (*Id.* at p. 993.) There was also no evidence of a working relationship between the accomplice and the police, and no evidence that the police asked the accomplice to obtain information from defendant in return for not filing charges against the accomplice.

In *Frye*, as in the present case, there is simply no evidence that the government sought to obtain incriminating evidence against defendant by knowingly circumventing his right to counsel. (*People v. Frye, supra*, 18 Cal.4th 894, 993.) In other words, neither Frye nor the defendant here showed "that the informant acted as a government agent at the behest of the police in accordance with a preexisting agreement and with the expectation of receiving a benefit or advantage . . . ." (*Ibid.*)

In *Frye*, the police merely facilitated communication by arranging for the accomplice to meet with defendant in jail. In the present case, the police only facilitated the tape recording of the telephone conversations by providing a tape recorder. Under *Frye*, that fact alone is insufficient to show a knowing circumvention of defendant's Sixth Amendment right to counsel. Defendant has failed to show that Ms. Camolinga was acting as the agent of the officers.

3. The Alleged Agreement. Defendant also argues that the evidence indicates there was an agreement between Ms. Camolinga and the police to elicit statements from defendant with regard to the pending murder case. He cites *In re Neely* (1993) 6 Cal.4th 901. In that case, our Supreme Court, discussing the merits of a *Massiah* claim, said: "In order for there to be a preexisting arrangement, however, it need not be explicit or formal, but may be 'inferred from evidence that the parties behaved as though there were an agreement between them, following a particular course of conduct' over a period of time. [Citation.] Circumstances probative of an agency relationship include the government's having directed the informant to focus upon a specific person, such as a cellmate, or having instructed the informant as to the specific type of information sought by the government. [Citation.]" (*Id.* at p. 915.)

Defendant argues that the testimony here supports his conclusion that "the only logical inference that can be derived from the facts adduced at the pretrial hearing is that there was an agreement between the police and Ms. Camolinga to gather information regarding the murder of Jose Ramon." While we agree that this is a permissible inference, it is not the only permissible inference that can be drawn from

the testimony. The trial court expressly found that the police did not initiate the contact with Ms. Camolinga, and that the conduct of the police in furnishing the tape recorder did not amount to interference or participation by the police which would create an agency relationship. It also found that "the witness in this case did not act as an agent of the government in attempting to elicit statements regardless of whether the statements were elicited for purposes of gathering information against the charges pending or for future threats." This is a permissible interpretation of the evidence. We therefore defer to the trial court's implied factual finding that defendant failed to show that Ms. Camolinga was acting as a government agent. The trial court could properly conclude that defendant failed to show an impermissible agreement between the police and Ms. Camolinga. It could also reasonably conclude that the evidence introduced at the hearing on the motion, and at trial, does not support an agency determination. (*People v. Fairbank, supra*, 16 Cal.4th 1223, 1247-1248.)

4. The Impermissible Creating of a Situation Likely to Induce Incriminating Statements. Under this heading, defendant discusses another leading case in this area, *United States v. Henry, supra*, 447 U.S. 264. In that case, officers contacted an informant who had previously been paid for information, and who was in the same jail as defendant Henry. The officers placed the informant in the same cell as defendant, and instructed the informant "to be alert to any statements made by the federal prisoners, but not to initiate any conversation with or question Henry regarding the bank robbery." (*Id.* at p. 266.) The informant elicited incriminating information and testified against defendant Henry at trial. The infor-

mant was paid for his information. (*Id.* at pp. 266-267.)

The issue in *Henry* was whether the officers had "deliberately elicited" the incriminating statements. The Supreme Court found three factors important: (1) the informant was paid for his information; (2) the informant was ostensibly only a fellow inmate; and (3) the conversations occurred while Henry was in custody and under indictment. (*United Stales v. Henry, supra*, 447 U.S. 264, 270.) Applying these factors, the court found that the court of appeals correctly held that Henry's statements to the informant should not have been admitted at trial: "By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." (*Id.* at p. 274, fn. omitted.)

The present case is somewhat different. First, there was no evidence that Ms. Camolinga was acting under instructions or that she was a paid informant. The only evidence in this regard was that the officers only told her to turn on the tape recorder whenever defendant called.

Second, defendant was out of jail on bail in late August 1999, when he called Ms. Camolinga and she recorded the calls. In *Henry*, the court treated incarceration as an important factor because "confinement may bring into play subtle influences that will make [defendant] particularly susceptible to the ploys of undercover Government agents. [In this case,] the incriminating conversations between [defendant] and [the informant] were facilitated by [the informant's] conduct and apparent status as a person sharing a common plight." (*United States v. Henry,*

supra, 447 U.S. 264, 274.) In other words, "the fact of custody bears on whether the Government 'deliberately elicited' the incriminating statements from Henry." (*Id.* at p. 273, fn. 11.)

Defendant's argument is that the statements were deliberately elicited because the officers must have known that the recording of defendant's conversations would not be limited to threats or intimidation of a witness, but would almost necessarily include conversations about the murder of Mr. Ramon. As *Henry* states: "Even if the agent's statement that he did not intend that [the informant] would take affirmative steps to secure incriminating information is accepted, he must have known that such propinquity likely would lead to that result." (*United States v. Henry, supra*, 447 U.S. 264, 271.) Thus, defendant argues that the officers here must have known that furnishing the tape recorder would likely lead to the obtaining of inculpatory evidence on the charged crime. Since Ms. Camolinga thought that the threats to her were conveyed by defendant's statements about the charged offense, "to prove the threats she must prove the murder." In other words, the officers deliberately elicited incriminating statements from the accused by giving Ms. Camolinga the recording equipment.

Although defendant's argument does make this a closer case, we are not persuaded. The other factors stated in *Henry* weigh against defendant's position, and we are not convinced that the mere furnishing of recording equipment, without more, is a violation of *Henry*. The police did nothing more than facilitate the recording of the conversation. As discussed above, such facilitation is not enough to show a knowing circumvention of defendant's Sixth Amendment right

to counsel. (*People v. Frye, supra*, 18 Cal.4th 894, 993.)

Our record supports the trial court's position that Ms. Camolinga undertook her interrogation on her own, and the officers did not know that she would do so. As discussed above, she was not acting as the agent of the officers in eliciting information and the fact that she acted on her own initiative supports the conclusion that the government did not deliberately elicit the incriminating statements. (*People v. Fairbank, supra*, 16 Cal.4th 1223, 1247.)

5. Admissibility of the Statements. For his final argument, defendant returns to *Maine v. Moulton, supra*, 474 U.S. 159. In the final portion of that opinion, the Supreme Court rejected the argument that the taping was permissible because the police were investigating an alleged plot to kill a witness. (*Id.* at pp. 178-180.) Although it was entirely proper to investigate the new crime, defendant's incriminating statements regarding the pending charges could not be used as evidence against him at the trial of those charges. (*Id.* at p. 179.) The court reaffirmed that such evidence was inadmissible "if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel." (*Id.* at p. 180, fn. omitted.)

Defendant argues that this is precisely the situation here. Assuming the police were entitled to investigate the new crime of intimidating a witness by recording defendant's telephone conversations, defendant argues that his statements concerning Mr. Ramon's murder, made during those recorded conversations, should have been excluded. He emphasizes that, because Ms. Camolinga believed she had

to obtain information about Mr. Ramon's murder in order to prove her own intimidation, it was likely the details of the murder of Mr. Ramon would be discussed in the telephone conversations. He thus finds his statements should have been excluded from the trial.

We disagree. The Supreme Court has recently reiterated that the Sixth Amendment right to counsel is offense specific. (*Texas v. Cobb* (2001) 532 U.S. 162.) The court rejected the position that the right to counsel attaches not only to the offense charged but also to other offenses which are closely related factually to the charged offense. It also held that the offense charged "does encompass offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test." (532 U.S. 162, ., 121 S.Ct. 1335, 1343, fn, omitted.)

Our Supreme Court has followed this decision and also held that the Sixth Amendment right only attaches to the charged offenses. (*People v. Slayton* (2001) 26 Cal.4th 1076.) Thus, defendant's Sixth Amendment right to counsel had not attached with respect to the uncharged crime of witness intimidation. This is true even if the facts relating to the witness intimidation were inextricably intertwined or closely related to the charged offense of murder. (*Id.* at p. 1082.)

The issue raised by defendant here is whether the officers knowingly circumvented defendant's Sixth Amendment rights. This argument is based on *Moulton*'s holding that the officers must not knowingly circumvent his right to counsel: "[T]he Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has

attached. [Citation.] However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." (*Maine v. Moulton, supra*, 474 U.S. 159, 176, fn. omitted.)

Defendant relies on the latter portion of the *Moulton* opinion, in which the prosecution argued that the incriminating statements should not have been suppressed because the officers had legitimate reasons for eavesdropping, i.e., they were investigating other crimes. The *Moulton* opinion rejects the argument. Striking a balance between the officers' right to investigate other crimes and the seeking of evidence to support pending charges, the court allows such investigation but excludes the evidence if the officers were knowingly circumventing the defendant's right to counsel. Specifically, the court said: "incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, not withstanding the fact that the police were also investigating other crimes, if; in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel." (*Maine v. Moulton, supra*, 474 U.S. 159, 180, fn. omitted.) In context, the court was discussing the argument that the police action was justified because the police were investigating another crime. At the end of the opinion, the court states: "Because we hold that the Maine police knowingly circum-

vented Moulton's right to have counsel present at a confrontation between Moulton and a police agent, the fact that the police had additional reasons for recording Moulton's meeting with [his codefendant] is irrelevant." (*Id.* at p. 180.)

However, an argument based on *Moulton* was rejected in Cobb because "'. . . to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities.'" (*Texas v. Cobb, supra*, 532 U.S. 162, 121 S.Ct. 1335, 1342, quoting *Maine v. Moulton, supra*, 474 U.S. 159, 179-180.)

The fact that the officers were investigating a new crime, witness intimidation, means that the Sixth Amendment right to counsel had not attached to that investigation, even if it was closely related to the murder investigation. Since the police were entitled to pursue the new investigation, we must uphold the trial court's decision under the principles discussed above unless we find that the officers knowingly circumvented defendant's right to counsel. To show knowing circumvention defendant would have to show an agreement between Ms. Camolinga and the officers to obtain evidence against defendant with regard to the charged crime. (*People v. Frye, supra* 18 Cal.4th 894, 993.)

No such showing has been made here. We therefore cannot make a finding of knowing circumvention. Instead, we must defer to the trial court's factual determinations (*People v. Fairbank, supra*, 16 Cal.4th 1223, 1247-1248) that (1) Ms. Camolinga was not acting as an agent of the police (2) there was no

agreement to elicit statements from defendant regarding the charged offense (*In re Neely, supra*, 6 Cal.4th 901, 915); and (3) the officers did not create a situation likely to induce incriminating statements (*United States v. Henry, supra*, 447 U.S. 264, 270). We therefore conclude that the officers did not knowingly circumvent defendant's Sixth Amendment rights. (*People v. Frye, supra*, 18 Cal.4th 894, 991-994.)

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

HOLLENHORST
Acting P. J.

We concur:

McKINSTER
J.

RICHLI
J.